IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-476

MICHIGAN OIL COMPANY, A MICHIGAN CORPORATION,
*Petitioner,*

*vs.*

NATURAL RESOURCES COMMISSION AND SUPERVISOR OF WELLS AND PIGEON RIVER COUNTRY ASSOCIATION,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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Petitioner, Michigan Oil Company, which was Appellant below, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Michigan entered in this action on March 1, 1979.

### OPINIONS BELOW

The decision of the Michigan Supreme Court is officially reported *sub nom. Michigan Oil Company* v. *Natural Resources Commission* at 406 Mich. 1, unofficially reported at 276 N. W.

2d 141 and reproduced in official form in Appendix A. The decision of the Court of Appeals of Michigan is officially reported at 71 Mich. App. 667, unofficially reported at 249 N. W. 2d 135 and reproduced in official form in Appendix E. The opinion of the Circuit Court for the County of Ingham, State of Michigan, which is unreported, is reproduced in Appendix F. The findings of fact, conclusions of law and order of the Natural Resources Commission, which are unreported, are reproduced in Appendix G. The findings of fact, conclusions of law and recommendation of the Hearing Examiner, which are unreported, are reproduced in Appendix H.

## JURISDICTION

The decision of the Michigan Supreme Court was entered on March 1, 1979. The Michigan Supreme Court denied Petitioner's timely motion for rehearing on May 7, 1979. On July 30, 1979, Mr. Justice Marshall entered an Order extending the time for filing this petition for writ of certiorari to and including September 21, 1979. Jurisdiction is conferred upon this Court by 28 U. S. C. § 1257(3).

## QUESTIONS PRESENTED

Petitioner is a successor in interest of an oil and gas lease covering state owned lands in the Pigeon River Country Forest (Pigeon River Forest) in the northern part of the lower peninsula of Michigan. The lease was purchased from the State of Michigan in 1968 at a public sale. In 1972, Petitioner made application to the Michigan Supervisor of Wells for permission to drill a well on the leased premises. The application was denied on July 21, 1972 and Petitioner appealed the denial to the Natural Resources Commission (NRC).

Thereafter in early 1973 an evidentiary hearing on the permit denial was held at the direction of the NRC before a hearing examiner it designated. This was the only evidentiary



hearing in the case and it was limited to the issue of whether "unnecessary" damage would occur under the surface waste definition of the Michigan Oil Conservation Act (Mich. Comp. Laws § 319.1 *et seq.*) by Petitioner's drilling of a well. Issues under the Michigan Environmental Protection Act (Mich. Comp. Laws § 691.1201 *et seq.*) were not raised. The NRC hearing examiner concluded that "unnecessary" damage was that committed by negligent operations or waste that could be prevented by precautions at the well location and that the claimed impact on the ecology (elk, bear and bobcat) was not a valid reason for refusing the drilling permit. Thereafter, however, the NRC ruled that "unnecessary" damage under the Oil Conservation Act included damage to the ecology and that such damage would occur by Petitioner's drilling. This ruling was affirmed by the courts.

Petitioner's drill site is approximately 2½ miles north of the State-Charlton 1-4 well, which was completed in June 1970 as an outstanding commercial producer. Probable reserves for Petitioner's well are estimated at 8 to 20 million barrels of oil.

The Department of Natural Resources (DNR) issued 34 drilling permits in a 2½ to 7 mile radius of Petitioner's site from the date of approval of the State-Charlton 1-4 to September 27, 1974. The hearing examiner found no significant difference between the closest locations for which those permits were granted and Petitioner's.

Following affirmance of the case by the Michigan Supreme court the DNR terminated the lease by letter dated May 8, 1979 (Appendix N), which Petitioner has protested without avail.

The questions presented are whether Respondent's denial of a drilling permit and termination of the lease are an unconstitutional taking of the value of the lease in violation of due process and equal protection under the Fourteenth Amendment and an unlawful impairment of contract in violation of Art. I, Section 10 of the Constitution of the United States; and whether

the NRC ruling after the evidentiary hearing had occurred, that "unnecessary" damage under the Oil Conservation Act included damage to the ecology, and therefore that Petitioner's drilling permit was properly refused, denied Petitioner due process by precluding any opportunity to offer rebuttal evidence.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(a) The Fourteenth Amendment to the United States Constitution, Section 1 of which provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(b) Article I of the United States Constitution, Section 10 of which provides in pertinent part:

"No State shall * * * pass any * * * law impairing the obligation of Contracts * * *."

(c) Michigan Oil Conservation Act, Mich. Comp. Laws § 319.1 *et seq.*, which is set forth in full in Appendix O.

(d) Michigan Department of Conservation Act, Mich. Comp. Laws § 299.1 *et seq.*, which is set forth in full in Appendix P.

(e) Michigan Environmental Protection Act, Mich. Comp. Laws § 691.1201 *et seq.*, which is set forth in full in Appendix Q.

## STATEMENT OF THE CASE

In 1968, the Michigan Department of Natural Resources (DNR) determined to offer at public sale oil and gas rights



in selected state-owned lands in the northern part of the lower peninsula of Michigan. A tentative list of the proposed areas was circulated on May 23, 1968 throughout the various DNR Divisions, for approval, objection, or the imposition of development restrictions.* (App. J, p. A124)

Restrictions or exclusions were recommended for some of the areas listed, but not for Corwith Township, the area here involved, located some 19 miles northeast of Gaylord. A revised list was then submitted by the DNR Lands Division to the same divisional heads for further review on July 11, 1968, for any further revisions or adjustments. The Region Manager, C. Troy Yoder, a 30 year DNR employee with upwards of 25 years of familiarity with the Pigeon River Forest area replied, on August 1, 1968, "No adjustments necessary." (App. J, p. A127)

The proposed lease sales were submitted to, and approved by, the DNR Deputy Director and then were sold at public sale in August of 1968. The successful bids and leases were submitted by DNR Director MacMullan to the NRC, were approved on September 5, 1968 by the NRC and were then submitted to and approved by the State Administrative Board on September 17, 1968. (App. J, p. A128)

In addition to the potential public benefits of such oil and gas exploration and development critically needed in these times of shortage, the State received $1,122,788 in 1968 on the leases sold, in addition to the extensive royalties accruing from successful wells. (App. J, p. A128)

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* The DNR personnel thus consulted included the Deputy Director of Administration, the regional managers, and the heads of the DNR Engineering Division, Fishing Division, Fire-Fighter Division, Forestry Division, Game Division, Geographical Survey Division, Lands Division, Parks Division, Recreation Resources Division, Planning Division, and Research Development Division. Such departmental heads were all veteran DNR personnel, familiar with the areas involved.

The lease here involved is reproduced in Appendix L. (pp. A175-A186) It was executed by the DNR on October 1, 1968, on the official DNR form, for a term of 10 years and "as long thereafter as oil and/or gas are produced in paying quantities." The declared leasehold purpose and authorized use of the land, as set forth in paragraph C of the lease, was:

> "* * * for the sole and only purpose of drilling, boring, mining and operating for oil and gas and acquiring possession of and selling the same * * *." (App. L, p. A175)

The lease provides for payment of annual fixed rentals together with a ⅛th royalty to the State of Michigan on all gas and oil produced. By paragraph G the lease also reserved to the state the right to use the premises "for any purpose other than, *but not to the detriment of, the* rights and privileges herein specifically granted * * *". (Emphasis added). (App. L, p. A185)

Paragraph H of the lease provided:

> "This lease shall be subject to the rules and regulations of the Department of Conservation now or hereafter in force relative to such leases, all of which rules and regulations are made a part and condition of this lease; *provided, that no rules or regulations made after the approval of this lease shall operate to affect the term of lease, rate of royalty, rental, or acreage, unless agreed to by both parties.*" (Emphasis added). (App. L, p. A186)

Under an agreement to assign dated May 12, 1972, Petitioner is the successor in interest of a 40 acre tract covered by this lease. (App. J, p. A) These 40 acres are the southwest quarter of the southeast quarter of Section 22, Corwith Township, Otsego County, Michigan. On May 31, 1972 Petitioner applied to the DNR Supervisor of Wells for the drilling permit required by the Michigan Oil Conservation Act (Mich Comp. Laws § 319.23; App. D, pp. A53; App. J, p. A118). The proposed site consists of approximately 2½ acres bordering the southerly line of Section 22. The requested permit would have involved a 3 or 4 week drilling operation, followed by suitable fencing and



screening of the well-site, and routine inspection visits by a supervisor, the oil or gas, if found, to be carried off by a pipeline to be installed for that purpose. Probable reserves were estimated at 8-20 million barrels of oil. (App. J, pp. A131-A132)

The site was duly inspected by staff members of the Supervisor of Wells' Department, who reported favorably on Petitioner's application. (App. J, pp. A126-A128) However, on July 21, 1972 the Supervisor of Wells notified Petitioner that he had been directed by DNR Director MacMullan to deny the drilling permit. (App. J, p. A139)

This denial of permit was appealed to the NRC. The NRC elected not to conduct the hearing itself but appointed Frederick S. Abood, to act as hearing examiner and submit his findings of fact, conclusions of law and recommendation to the NRC. (App. J, p. A119)

By pre-trial statements filed, the hearing examiner was limited to the issue of whether the proposed well would cause "unnecessary" damage under the Michigan Oil Conservation Act.* (App. J, p. A149) On the eve of the evidentiary hearing, appellee Pigeon River Country Association was permitted to intervene but was limited to these same issues of "unnecessary" damage. Neither the DNR nor intervenor raised any issue under the Michigan Environmental Protection Act. The hearing then went forward early in 1973. (App. J, p. A119)

On October 11, 1973, the hearing examiner filed carefully documented findings of fact and conclusions of law. (App. J, pp. A119-A153) He found that Petitioner's well site was approximately 2½ miles north of the State-Charlton ¼ well which was completed in June of 1970 as a commercial producer; that at the time of the hearing there were five producing wells in

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* Section 2 provides: " 'Surface waste,' as those words are generally understood in the oil business, and in any event to embrace * * * (2) the unnecessary damage to or destruction of the surface, soils, animal, fish or aquatic life or property from or by oil and gas operations; * * *." (App. O, p. A. 197)

Charlton Township, the township immediately south of Corwith Township and also in the Pigeon River Forest; that since the denial of Petitioner's permit, three permits had been issued, one in Section 19 of Corwith Township and two in Charlton Township; that all of the wells, both producing and permitted, were comparably situated to petitioner's with respect to the Black River and the Black River Swamp; that in the Pigeon River area are deer, bear, bobcat, elk and game birds; that the elk range, which includes Corwith Township, covers 600 square miles; that no unique or special wildlife habitat features are present at the well site; that the area is a scene of much activity, including camping, snowmobiling, hunting of deer, bear, bobcat, coyote, rabbit and bird, training of hunting dogs, fishing, motorcycle riding, all-terrain vehicle cruising, hiking, timber cutting, skiing, pipelines, wells and more; that there are snowmobile parking lots in the adjacent Sections of 21 and 27 of Corwith Township; and that county roads border Section 22 on three sides, a trail road is on the fourth and other trail roads within. (App. J, pp. A134-A138)

The hearing examiner found that if Petitioner's well were drilled, there would be no significant effect as to the soil, fish or aquatic life and it would not affect in any significant way deer, birds and small animals. He noted the DNR's claim was that the elk, bear and bobcat are disturbed by any human activity and that this is "unnecessary" damage. He also noted however, that, although more than two years had passed since the State-Charlton 1-4 well had been drilled, no one had made a study to determine the effect of an oil well on elk, bear and bobcat; that there was no evidence whatsoever of any such effect; but that the elk were still there sharing their range with camping, snowmobiling, hunting, timber harvesting and other uses. He concluded that it was not established that Petitioner's well would cause damage to elk, bear or bobcat; and if human presence disturbs elk, it is wide spread in the area and no one could testify that an oil well is more disturbing than snowmobiling, hunting, use of dog packs, commercial timber harvesting and the many other year-round activities there. The hearing examiner further found discrimination and arbitrary action in the denial of Petitioner's permit and in the subsequent approval of other applications. He concluded that necessarily there will be damage by the drilling of an oil well, but no "unnecessary" damage; that drilling in a careful and prudent manner and in accordance with the rules and regulations cannot be "unnecessary" since it is required to accomplish the legitimate lease objective; and that Petitioner was only asking to drill as others had in the same area and the Fourteenth Amendment guaranteed equal treatment. (App. J, pp. A151-A153)



Objections to the hearing examiner's report were filed by respondents and the issues argued to the NRC. On April 16, 1974 Petitioner was notified that the NRC had adopted a motion to "set aside the Hearing Examiner's Report and uphold the denial, by the Supervisor of Wells, of a permit"; and had also asked the Attorney General's office to prepare such an order "with appropriate findings of fact." (App. H, p. A114) On May 14, 1974 Petitioner was advised that the NRC had accepted and approved the findings of fact and conclusions of law thus prepared by the Attorney General to support the resolution of denial already adopted without any such findings. (App. I, p. A115) In these findings (App. G, pp. A107-A113) the NRC rejected the findings of the hearing examiner and Petitioner's constitutional claims of due process, equal protection and impairment of contract which had been asserted in its appeal from the denial of the drilling permit.

The NRC's decision was appealed to the Ingham County Circuit Court which affirmed the Commission. (App. F, pp. A 91-A106) The Circuit Court likewise rejected Petitioner's consitutional arguments. Its decision was appealed to the Michigan Court of Appeals and was there affirmed in a 2 and 1 decision (App. E, pp. A55-A90) and that decision, in turn, was

affirmed by the Michigan Supreme Court in a closely divided decision. (App. A, pp. A1-A46)

Three of seven Justices dissented, holding that neither the Department of Conservation Act nor the Oil Conservation Act justified denial of the permit. Two of the dissenting Justices would have remanded the case to the NRC and one to the Circuit Court for a hearing under the state's Environmental Protection Act. (App. Q, pp. A227-A231) Petitioner applied to the Michigan Supreme Court for a rehearing, for reasons which included the court's tacitly condoning violations of Petitioner's constitutional rights of due process, equal protection and protection from impairment of contract and denial of right to introduce evidence on the ecological issues under the Michigan Environmental Protection Act. (App. C, pp. A49-A52) The Michigan Supreme Court denied the Motion for Rehearing without an opinion. (App. D, p. A53)

Justice Levin in his dissent (406 Mich. 56) pointed out the interrelation of this case and *West Michigan Environmental Action Council* v. *Natural Resources Commission,* 405 Mich. 741, 275 N. W. 2d 538 (1979), petition for writ of certiorari in *West Michigan* having been filed with this Court on August 29, 1979, October Term, 1979, No. 79-335:

> "In both *West Michigan Environmental Action Council* v. *Natural Resources Commission,* 405 Mich. .....; ..... NW 2d ..... 1979), and the instant case, the oil companies (and in West Michigan, the DNR as well) took the position that the environmental issue was not properly raised and triable—in *West Michigan* because the complaint related only to the effects of the consent order and not to the effects of drilling test wells, in *Michigan Oil* because the issue framed was whether, as a result of the drilling, there would be "unnecessary damage" within the meaning of the oil conservation act.
>
> "In both cases, the trier of fact agreed with the oil companies in the triable issue and concluded that any impact of the drilling on the ecology was not a valid reason for refusing to permit the drilling to proceed.



> "While the environmental plaintiffs and intervenors presented evidence of environmental damage to the PRCSF [Pigeon River Country State Forest] as an entirety, the oil companies did not offer rebuttal either because they could produce none or because they relied on their legal position that the environmental harm shown by the environmental plaintiffs and intervenors was not a valid reason for refusing to allow the drilling.
>
> "In both cases, on review—after the evidentiary record was closed—the trier of fact was reversed on the question of what was the triable issue: This Court holds, in *West Michigan,* that the effects of the test drilling was a triable issue in that case. The NRC ruled in the instant case that 'unnecessary damage' under the oil conservation act includes damage to the ecology; the circuit court and the Court of Appeals affirmed, and this Court affirms. As a consequence, the oil companies have not had an opportunity—after the rulings against them on what constituted the triable issue—to offer rebuttal evidence." (App. A, pp. A32-A33)

Immediately after the Michigan Supreme Court denied rehearing on May 7, 1979, by letter dated May 8, 1979 the DNR terminated Petitioner's lease, which Petitioner has protested without avail. (App. N, pp. A192-A193)

## REASONS FOR GRANTING THE WRIT

The decision below raises important constitutional issues that merit review and resolution by this Court. A bare majority of the Michigan Supreme Court upheld a taking of the value of Petitioner's oil and gas lease without compensation in violation of its rights to due process and equal protection and its right against unlawful impairment of that contract. Its decision conflicts with the holdings of this Court and totally eradicates Petitioner's rights in its oil and gas lease without any compensation under the guise of protecting the ecology. This not only eliminates valuable oil potential for Petitioner but for the public, as well. As pointed out in the petition for writ of certiorari in

the inter-related case of *West Michigan Environmental Action Council, supra,* the disregard of due process has brought to a standstill a significant energy project in the Southern Pigeon River Forest area. It is critically important in this period of energy crisis, both for Michigan and the other states, that some fair balance be achieved in the maintenance and development of the total environment, rather than preserving the wild life habitat at the sacrifice of due process. Only this Court's review and reversal of the ruling below can restore some meaning to due process, equal protection and protection against impairment of contracts.

## I. The State's Denial of a Drilling Permit and Termination of Petitioner's Oil and Gas Lease Is an Unconstitutional Taking of the Value of the Lease in Violation of Due Process and Equal Protection Under the Fourteenth Amendment and an Unlawful Impairment of Contract in Violation of Article I, Section 10 of the Constitution of the United States.

The State of Michigan initiated public sale to Petitioner's predecessor of the oil and gas lease here involved in 1968. It accepted bonus and yearly acreage payments, but thereafter denied a well permit to petitioner while approving permits to others nearby in similar locations. The State then litigated for over six years to impose a permit denial, totally frustrating the purpose of the lease and, immediately upon denial of rehearing by the Michigan Supreme Court, formally terminated the lease. During these years the state has received all of the benefit called for by the lease other than the drilling it curiously refuses, and Petitioner has been totally stripped of all rights.

The lease clearly provides in paragraph C of the official DNR form that it was:

> "* * * for the sole and only purpose of drilling, boring, mining and operating for oil and gas and acquiring possession of and acquiring the same * * *." (App. L, p. A175)



Paragraph G of the lease reserves to the state the right to use the premises "for any purpose other than, *but not to the detriment of,* the rights and privileges herein specifically granted." (Emphasis added) (App. L, p. A185)

Paragraph H of the lease provides:

> "this lease shall be subject to the rules and regulations of the Department of Conservation now or hereafter in force relative to such leases, all of which rules and regulations are made a part and condition of this lease; *provided, that no rules or regulations made after the approval of this lease shall operate to affect the term of lease, rate of royalty, rental, or acreage, unless agreed to by both parties.*" (Emphasis added) (App. L, p. A186)

As the case now stands, the state has successfully prevented petitioner from accomplishing the purpose of the lease and, having achieved this, has specifically terminated the lease. It purports to have eliminated every right petitioner ever had in the lease and has done so totally apart from any eminent domain proceeding. If there ever was a total taking without compensation, this is such a case. The Circuit Court attempted to justify its position by stating:

> "It might be noted parenthetically that petitioner still holds the oil lease rights and should there come a time that oil exploration technology makes it possible to drill State Corwith 1-22 without this degree of ecological destruction, petitioner may acquire a permit to so drill." (App. F, pp. A102-A103)

The majority of the Court of Appeals rationalized its position as follows:

> "We turn next to the alleged constitutional infirmities in the commission's actions. Appellant claims that the denial of a perimt to drill for oil constituted an unconstitutional taking of property without payment of just compensation. We disagree. As correctly pointed out by the circuit court judge in discussing this issue, there is no claim here and no proof that denial of this drilling permit would

result in the loss of the primary value of the property in question. It is clear, however, that should appellant never receive a drilling permit, whatever property interest appellant claims in the property in question would be valueless." (App. E, p. A67)

Time has now demonstrated that the state intended to and did make the denial of the drilling permit effective for all time. By its termination of the lease the state confirms what seemed clear to Petitioner all along: there had been a total taking without compensation.

## A. Due Process

The instant case closely parallels *Pennsylvania Coal Company* v. *Mahon,* 260 U. S. 393 (1922). Under a deed to the surface homeowner the coal company had reserved the right to remove all of the coal and the surface owner specifically took the risk and waived all claims for damages that might arise from mining of the coal. A Pennsylvania statute was subsequently enacted which prohibited the mining of coal in such a way as to cause subsidence to houses. On suit by the private homeowner to prevent the mining of coal under his property, this court reversed the Pennsylvania Supreme Court and held that there was an unconstitutional taking and a violation of due process and contract rights. The Court said, at page 413:

> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act * * *."



That limit was exceeded in the *Mahon* case and is here. In the instant case there is a total taking and a total elimination of the oil and gas lease. If that is not a taking without compensation, the constitutional protection has lost its meaning.

In *United States* v. *Causby,* 328 U. S. 256 (1946), this Court held that there was an unconstitutional taking of an easement of air space.

Respondents owned 2.8 acres near an airport which contained a house and out-buildings mainly used for raising chickens. The end of one runway of the airport was less than ½ mile from the buildings and the glide path of the runway passed directly over the property, which was 100 feet wide and 1200 feet long. The glide path was at an angle that placed it 67 feet above the house and 63 feet above the barn. The runway was being used about 4% of the time in takeoff and 7% of the time in landing. The United States began using the airport under lease commencing June 1, 1942, using four-motored heavy bombers and other military planes. The noise was startling and as a result of the noise, Respondents had to give up their chicken business, thus destroying the use of the property as a commercial chicken farm. Respondents also were deprived of their sleep and the family became nervous and frightened.

The government argued that any damages were merely consequential for which no compensation could be obtained under the Fifth Amendment.

This court held that there had been a taking of an easement over the property for which just compensation must be paid.

In petitioner's situation here there was a total taking. The use of the lease, limited to the sole purpose of drilling, was effectively prevented by the state and it made doubly sure of that effect by terminating the lease on May 8, 1979.

See also *Armstrong* v. *United States,* 364 U. S. 40 (1960) [Government's complete destruction of a materialman's lien in property held a "taking"]; *Hudson County Water Company* v.

*McCarter*, 209 U. S. 349 (1908) [if height restriction makes property wholly useless "the right of property prevails over the public interest"]; *United States* v. *Cress*, 243 U. S. 316 (1917) [repeated floodings of land caused by water project is a taking.]

As pointed out by the dissenting opinion of the Michigan Court of Appeals:

> "In a case similar to the one at hand, *Union Oil Co. of Cal.* v. *Morton*, 512 F2d 743 (CA9, 1975), a federal lease for off-shore drilling with the right to erect a drilling platform had been sold to Union Oil Co. After one drilling platform caused a serious oil spill in the Santa Barbara Channel, an order of the Secretary of Interior suspended drilling rights in the area and denied Union the right to install another drilling platform. In remanding to the District Court, the Court made it clear that if the practical exercise of the lease was being denied indefinitely, such action of the Secretary must be overturned. After noting so that the Secretary had no powers of condemnation, the Court said, pp. 750-751,
>
> > 'If, as Union contends, platform C is a necessary means for the extraction of oil from a portion of the leased area, refusal to permit installation of that platform now or at any time in the future deprives Union of all benefit from that lease in that particular area. We therefore conclude that an open-ended suspension of the right granted Union to install a drilling platform would be a pro tanto cancellation of its lease.
> >
> > 'Such taking by interference with private property rights is within the constitutional power of Congress, subject to payment of compensation. * * But Congress no more impliedly authorized the Secretary to take the leasehold by prohibiting its beneficial use than by condemnation proceeding. A suspension for which the fifth amendment would require compensation is therefore unauthorized and beyond the Secretary's power.' " (App. E, pp. A89-A90)

The latest due process case decided by this Court is *Penn Central Transportation Company* v. *City of New York*, 438



U. S. 104 (1978). It upholds the City in restricting air rights, but for reasons that are not applicable to the instant case. The Court held that there had been no interference with the present use of the property and that that use permitted a reasonable return on the investment. In addition, there had not been a total elimination of the air rights. While Penn Central had been refused permission to construct a 50-story tower above its terminal, construction of some smaller structure had not been precluded. Further, the air rights were transferable and readily marketable.

In the instant case there is no way to salvage the total destruction of all lease rights. The drilling which was the sole object of the lease was prohibited and the lease absolutely terminated. If there had been an extension of the lease to such a time in the future when a drilling permit was issued and opportunity given at that future time to drill, then there could have been some argument on a sufficient retention of rights that the state's action would not constitute a taking and preserved the constitutionality of the drilling prohibition. See for instance *Mobil Oil Corporation* v. *Kelley*, 353 F. Supp. 582 (SD Ala. 1973), where, much as in this case, the state announced its opposition to the company's drilling in Mobile Bay. The district court stated, at page 586:

> "It is clear from the history of the Department of Conservation's issuance of permits under its oil and gas leases and from the content of the oil and gas leases in question, that it was contemplated by the parties at the time the subject leases were made that Mobil would have the right to drill. It would indeed be a strained construction of the lease arrangements to arrive at a conclusion which would in effect hold that the plaintiff received, and the defendant State Department of Conservation gave no more than a lottery ticket, a chance, for the right to drill for oil and gas."

The court then ordered that the primary term of the lease be extended until such date as the oil and gas board issued a valid

drilling permit and for an additional two years thereafter if there was drilling.

Here there is nothing to save the state action both prohibiting drilling and terminating the lease from condemnation as a constitutionally unwarranted taking in violation of due process.

**B. Impairment of Contract**

Not only does the state denial of Petitioner's drilling permit and the termination of its lease trample on its due process rights; such action also unconstitutionally impairs the obligation of the lease contract. *Allied Structural Steel Company* v. *Spannaus*, 438 U. S. 234 (1978), is the most recent case from this Court holding that the Contract Clause had been violated. The steel company was the sole contributor to a pension fund for its employees. It retained a virtually unrestricted right to amend and was free to terminate the plan and distribute the trust assets at any time for any reason.

In 1974, Minnesota enacted the Private Pension Benefits Protection Act under which an employer such as the steel company was subject to a "pension funding charge" if it either terminated the plan or closed a Minnesota office. The steel company closed its Minnesota office later that year and was then notified by the state that it owed a pension funding charge of approximately $180,000. The company sued in federal district court asking for injunctive and declaratory relief. The Act was upheld and the appeal followed. The Court reviewed the background and more recent cases under the Contract Clause and held that it was violated.

The Court summarized the applicability of the Contract Clause at pages 243-245:

> "The most recent Contract Clause case in this Court was *United States Trust Co.* v. *New Jersey*, 431 U. S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92.[14] In that case the Court again recognized that although the absolute language of the Clause must leave room for 'the "essential attributes



> of sovereign power," id., at 435, necessarily reserved by the States to safeguard the welfare of their citizens.' *id.*, at 21, 97 S. Ct., at 1517, that power has limits when its exercise effects substantial modifications of private contracts. Despite the customary deference courts give to state laws directed to social and economic problems, '[l]egislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption.' *Id.*, at 22, 97 S. Ct., at 1518. Evaluating with particular scrutiny a modification of a contract to which the State itself was a party, the Court in that case held that legislative alteration of the rights and remedies of Port Authority bondholders violated the Contract Clause because the legislation was neither necessary nor reasonable.[15]
>
> III.
>
> "In applying these principles to the present case, the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.[16] The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage.[17] Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.
>
> "The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." [Footnotes 14, 16 and 17 omitted]

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"15. The Court indicated that impairments of a State's own contracts would face more stringent examination under the Contract Clause than would laws regulating contractual relationships between private parties, 431 U. S. at 22-23, 97 S. Ct., at 1518, although it was careful to add that 'private contracts are not subject to unlimited modification under the police power.' Id., at 22, 97 S. Ct., at 1518."

The Court then concluded, at pages 250-251:

> "* * * But we do hold that if the Contract Clause means anything at all, it means that Minnesota could not constitutionally do what it tried to do to the company in this case."

We submit, likewise, that if the Contract Clause means anything at all, it means that the state cannot prohibit drilling and then cancel its lease as it has tried to do to Michigan Oil Company in the instant case.

While Petitioner's lease was subject to proper rules and regulations relating to the drilling, its sole purpose was drilling and, certainly, neither this nor the intention of the parties as shown by the lease as a whole contemplated a total frustration of purpose followed by the termination of the lease. Indeed, paragraph H specifically recognized that regulation was not to impinge on the lease term. Yet, that is precisely what the state has accomplished here by a blanket prohibition for all time on drilling, litigating that issue for over six years, and then terminating the lease.

**C. Equal Protection**

We have not found any equal protection cases paralleling the situation of Michigan Oil Company. However, the applicable equality principle seems clear.

In *Police Department of the City of Chicago* v. *Mosley*, 408 U. S. 92 (1972), a city ordinance forbade any picketing within 150 feet of a school, except for peaceful labor dispute picketing. The rationale for the rule was to prevent school disruptions. The Court found this ordinance to be invalid as an unequal application of a prohibition which had no relevance to the objective sought. The Court stated at page 95:

> "* * * As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment. See *Reed* v. *Reed*, 404 U. S. 71, 75-77, 92 S. Ct. 251, 253-254, 30 L. Ed. 2d 225 (1971); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 92 S. Ct. 1400, 31 L. Ed. 2d 768 (1972); *Dunn* v. *Blumstein*, 405 U. S. 330, 335, 92 S. Ct. 995, 999, 31 L. Ed. 2d 274 (1972)."



*Reed* v. *Reed*, 404 U. S. 71 (1971) explained the principles governing application of the Equal Protection Clause, at pages 75-76:

> "In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. *Barber* v. *Connolly*, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923 (1885); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 71, 31 S. Ct. 337, 55 L. Ed. 369 (1911); *Railway Express Agency* v. *New York*, 336 U. S. 106, 69 S. Ct. 463, 93 L. Ed. 533 (1949); *McDonald* v. *Board of Election Commissioners*, 394 U. S. 802, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415, 40 St. Ct. 560, 561, 64 L. Ed. 989 (1920)."

In the instant case, the state granted drilling permits to others in close proximity to Petitioner's site, both before and after Petitioner's drilling permit was denied. The undisputed testimony was that Petitioner's well site was approximately 2½ miles north of State-Charlton 1-4 well, which was completed in June of 1970 as a commercial producer; that at the time of the evidentiary hearing there were five producing wells in Charlton Township, the township immediately south of Corwith Township

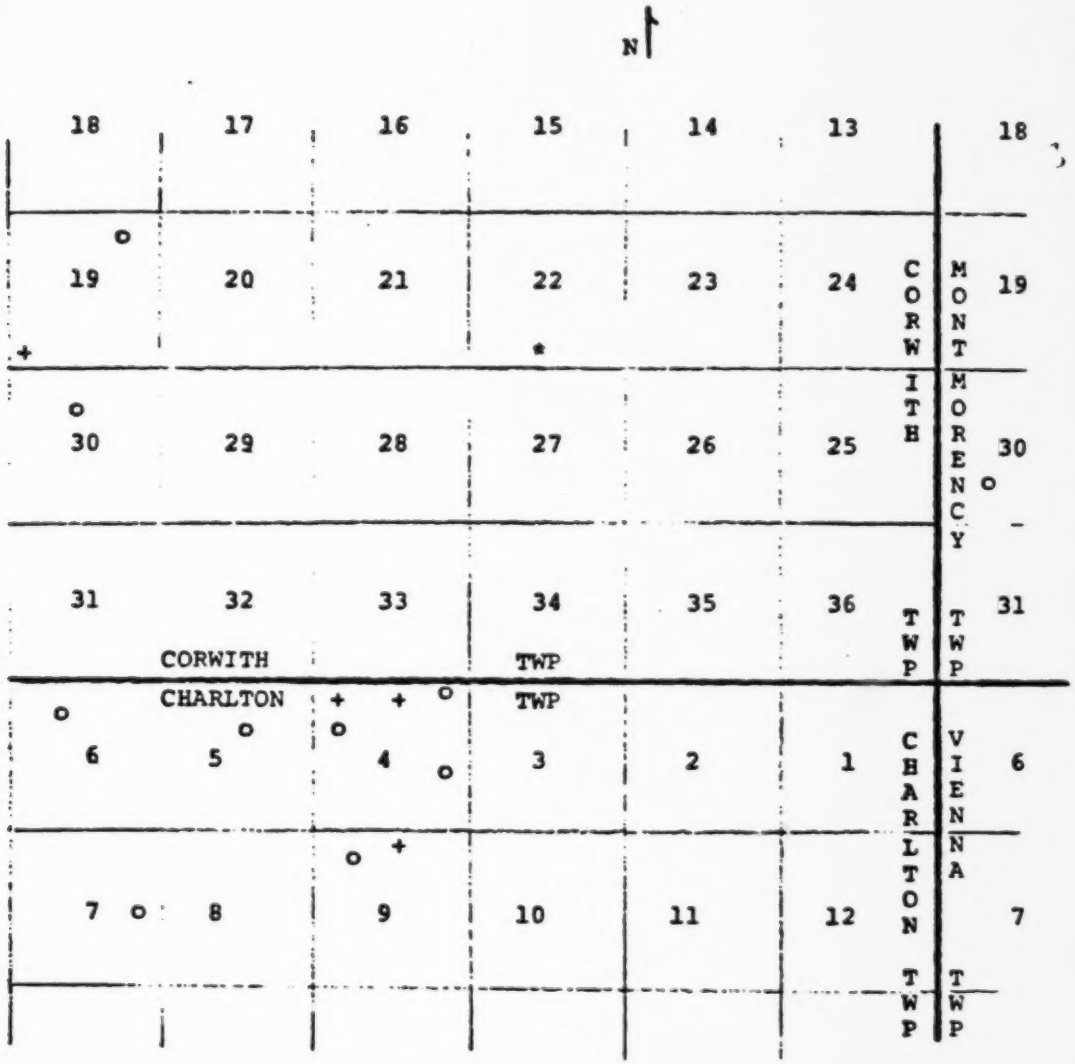
and also in the Pigeon River Forest; that since the denial of Petitioner's permit, three permits had been issued, one in Section 19 of Corwith Township and two in Charlton Township; that all of these wells, both producing and permitted, were comparably situated to Petitioner's with respect to the Black River and the Black River Swamp. The hearing examiner then specifically found as follows:

> "5. The proposed well location does not differ in any significant way from other locations for which the DNR has granted drilling permits in the Pigeon River area." (App. J, p. A153)

and recognized the constitutional problems which would arise if Petitioner was not permitted to so drill.

Further, the well permit information was updated to September 27, 1974 and this showed DNR approval and issuance of thirty-four drilling permits in a 2½ to 7-mile radius of Petitioner's site from the date of approval of the State-Charlton 1-4 well. Sixteen of these had been granted in the two-year period preceding Petitioner's application and eighteen in the eighteen months following denial of the application. (App. M, pp. A187-A189)

The Circuit Court based its rejection of the Equal Protection argument on the ground that the evidence of similar wells was not a sufficient showing of arbitrariness to constitute a denial of equal protection. The Circuit Court does not explain how it rationalized the finding of the hearing examiner nor does it make any reference to the updated well-permit information or the well permits approved after Petitioner's had been requested. While the Circuit Court justified its treatment on the basis of a change of policy by the DNR after the permit for the Charlton 1-4 well in 1970, this does not explain the unequal treatment of the approvals after Petitioner's request for a well permit on May 31, 1972.




* Petitioner's well location
o Well permits issued subsequent to Petitioner's request
\+ Well permits issued prior to Petitioner's request

[See App. M, pp. A187-A191 ]

Scale 1" = 1 mile



In its opinion affirming the Circuit Court, the majority of the Michigan Court of Appeals appeared to base its justification of the unequal treatment on the fact that "no permits have been issued on any of the land in the twenty-five square mile area surrounding proposed Corwith 1-22, indicating that denial of the instant permit was based on a plan having a rational foundation promoting a legitimate state purpose and, therefore, constituting no denial of equal protection to Appellant." (App. E, p. A73) A more detailed analysis of this seemingly large 25 square mile area dispels its applicability.

By reference to the attached diagram it may be seen that Petitioner's well site was on the southerly line of Section 22 of Corwith Township. Thus, of the twenty-five square miles referred to by the Court, fifteen were north of the drill site in three tiers of sections each one mile square. These were Sections 8 to 12 inclusive, 13 to 17 inclusive and 20 to 24 inclusive of Corwith Township. Ten of these one square mile sections were south of the well site in two tiers of five sections each, being Sections 25 to 29 inclusive and 32 to 36 inclusive. However, within a three mile radius of Petitioner's well site 13 permits had been issued, 9 of them subsequent to Petitioner's well permit request of May 31, 1972. One of these subsequent permits was just over two miles south of Petitioner's well site in Section 4 of Charlton Township; 2 others were in that same section; and one each in Sections 5, 6 and 9. Two others were just three miles west of Petitioner's well site, one in Section 19 and one in Section 30 of Corwith Township. Another was three miles east in Section 30 of Montmorency Township.

In view of the ecology claims used to justify the denial of Petitioner's well permit, including the claims that the elk are particularly sensitive to any human activity and have a range in the Pigeon River Forest of 600 square miles, that there is a county road only a few hundred feet from Petitioner's well site, running along the southerly line of Section 22, county roads on two sides of Section 22 and a trail road on the fourth side, as

well as interior trail roads, that there is a snowmobile parking lot about a half mile from the well site, a snowmobile trail only 330 feet away, and that camping, sightseeing, hunting, fishing, timber harvesting, horseback riding, hiking and motorcycle riding, all go on in the area, the attempted justification that such a program of well approvals represented a rational plan which did not deny equal protection is, itself, without foundation.

## II. The NRC Ruling After the Evidentiary Hearing Had Occurred That "Unnecessary" Damage Under the Oil Conservation Act Included Damage to the Ecology Denied Petitioner Due Process by Precluding Any Opportunity to Offer Rebuttal Evidence.

This Court has repeatedly required, even in cases that involved informal administrative action, that notice be adequate "to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'" *Memphis Light, Gas & Water Division* v. *Craft*, 436 U. S. 1, 14 (1978) [condemning as inadequate the notice provided by a regulated utility to one of its consumers on the grounds that it may not have apprised him of available procedures for challenging his disputed utility bill]. *See also, Matthews* v. *Eldridge*, 424 U. S. 319, 325n.4 (1976); *Goldberg* v. *Kelly*, 397 U. S. 254 (1970).

Petitioner had no such notice here. At the time of the evidentiary hearing, the sole issue in the case was whether as a result of the drilling, there would be "unnecessary" damage within the meaning of the Oil Conservation Act. Petitioner's evidence was designed to meet this claim and the hearing examiner, based on that statute* and Opinion 4718 of the Michigan Attorney General, held that "drilling and producing operations carried on in a careful and prudent manner and in keeping with applicable rules and regulations cannot be un-

* See page 9 *supra*.



necessary damages since these activities are required to accomplish the legitimate drilling and producing objective." Relying on this legal position which was the issue framed by the parties for the evidentiary hearing, Petitioner did not introduce any rebuttal evidence on the harm to the ecology (elk, bear and bobcat) claimed by the DNR and intervenor. Nor, since neither the ecology issues nor the Michigan Environmental Protection Act were a part of the case, was it proper to offer evidence pursuant to Sec. 3 of that Act that there were no reasonable alternatives to the proposed drilling or that drilling at Petitioner's site, in any event, served the larger public interest. It was only after the evidentiary hearing had closed and after the hearing examiner had made his findings of fact and conclusions of law, that the NRC reversed him on this question of what was the triable issue. The Michigan Supreme Court has affirmed the NRC's position. Moreover, this was done under a strained interpretation of the Oil Conservation Act and the Department of Conservation Act which ignored the failure to promulgate rules under the procedural safeguards of the Michigan Administrative Procedures Act (Mich. Comp. Laws § 24.201 *et seq.*), the provisions and purpose of the lease and the lack of any standard to determine whether such environmental damage is "unnecessary." At the same time, Petitioner has been deprived of an opportunity to present evidence on the subsequently determined ecology issue. As stated by Justice Levin in his dissent:

> "While the environmental plaintiffs and intervenors presented evidence of environmental damage to the PRCSF [Pigeon River Country State Forest] as an entirety, the oil companies did not offer rebuttal either because they could produce none or because they relied on their legal position that the environmental harm shown by the environmental plaintiffs and intervenors was not a valid reason for refusing to allow the drilling.
>
> "In both cases, on review—after the evidentiary record was closed—the trier of fact was reversed on the question of what was the triable issue: This Court holds, in *West*

> *Michigan,* that the effects of the test drilling was a triable issue in that case. The NRC ruled in the instant case that 'unnecessary damage' under the oil conservation act includes damage to the ecology; the circuit court and the Court of Appeals affirmed, and this Court affirms. As a consequence, the oil companies have not had an opportunity—after the rulings against them on what constituted the triable issue—to offer rebuttal evidence." (App. A, pp. A32-A33)

In so entering judgment for the respondents under these circumstances, without at least remanding the case to the NRC to give Petitioner an opportunity to present its rebuttal evidence, the Michigan Supreme Court directly contradicted the rule of this Court in *Saunders* v. *Shaw,* 244 U. S. 317 (1917). In that case, Mr. Justice Holmes, writing for a unanimous Court, dealt with a situation remarkably similar to the present one. Plaintiff filed suit in a state court of Louisiana to enjoin the collection of a drainage tax, offering evidence to show that his land would receive no benefit from the drainage project. Defendant objected to this evidence, and it was excluded as inadmissible. 244 U. S. at 318. Ultimately, however, the Louisiana Supreme Court upheld plaintiff's claim that his land could not be benefited from the project and granted an injunction against the tax assessment.*

This Court reversed, holding that "when the trial court ruled that it was not open to plaintiff to show his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible * * *." 244 U. S. at 319. The Court took this action because it could not otherwise "be sure that the defendant's rights are protected without giving him a chance to put his evidence in." *Id.*

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* Two Justices of the Louisiana Supreme Court, like the minority below here, dissented from its action, arguing that the case should be remanded to the trial court. 244 U. S. at 319.



Not only has the rule of *Saunders* v. *Shaw* been recognized in subsequent decisions of this Court,** but in other relevant contexts, this Court has struck down as inadequate, notice in state proceedings which was too vague to inform defendants or others of the precise nature of the charges or actions that might be taken against them. *Memphis Light, Gas & Water Division* v. *Craft, supra,* 436 U. S. 1; *Taylor* v. *Hayes,* 418 U. S. 488 (1974); *Eaton* v. *City of Tulsa,* 415 U. S. 697 (1974); *In re Ruffalo,* 390 U. S. 544, 551 (1968).

Here, Petitioner did not know until after the evidentiary hearing and indeed not until the Michigan Supreme Court's 4 justice majority opinion that "unnecessary" damage would be interpreted to include damage to the ecology. Accordingly, it had no opportunity to offer rebuttal testimony which was beyond the triable issue.

## CONCLUSION

For the foregoing reasons, a Writ of Certiorari should be issued to review the decision of the Michigan Supreme Court.

Respectfully submitted,

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Dated: September 19, 1979

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** *See, e.g., Hamling* v. *United States,* 418 U. S. 87, 110, 157 (1974), in which all nine members in the Court referred to the rule of that case without in any sense questioning its continuing application.